

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Woodrow Flemming,

Plaintiff,

-v-

9:11-CV-804 (NAM/TWD)

Lester Wright, et al.,

Defendants.

APPEARANCES:

Woodrow Flemming
03-A-5259
Upstate Correctional Facility
P.O. Box 2001
Malone, New York 12953
Plaintiff, pro se

Hon. Eric T. Schneiderman, Attorney General of the State of New York
Richard Lombardo, Esq., Assistant New York State Attorney
The Capitol
Albany, New York 12224
Attorney for Defendants

Hon. Norman A. Mordue, Senior U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

Plaintiff, an inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), brought this action under 42 U.S.C. § 1983. In his two remaining causes of action, plaintiff alleges that defendants denied him adequate and proper medical care and exhibited deliberate indifference to his serious medical needs in violation of his rights under the Eighth Amendment.

Defendants moved (Dkt. No. 36) to dismiss for lack of personal jurisdiction and failure to

state a claim. Upon referral pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c), United States Magistrate Judge Terèse Wiley Dancks issued a thorough Report-Recommendation and Order (Dkt. No. 45). Magistrate Judge Dancks recommends that defendants' Rule 12(b)(6) motion be granted; that the complaint be dismissed with leave to amend; and that if plaintiff timely files an amended complaint which survives initial review, new summonses be issued for those defendants named in the amended complaint, and plaintiff be given additional time to effect proper service of the summons and amended complaint on the defendants.¹ Plaintiff moves (Dkt. No. 47) for a seven-month "delay" in "ruling" unless counsel is assigned for him.

Plaintiff has submitted an objection (Dkt. No. 46). Based on the nature of the issues raised in plaintiff's objection and his *pro se* status, the Court conducts a *de novo* review of the Report-Recommendation and Order pursuant to 28 U.S.C. § 636(b)(1)(C). Upon review, the Court accepts the Report-Recommendation and Order in its entirety.

As for plaintiff's motion (Dkt. No. 47) for appointment of counsel, the Court finds that the action does not appear to be likely to have substance, the issues presented are not overly complex, and Magistrate Judge Dancks' Report and Recommendation gives plaintiff sufficient guidance if he decides to draft an amended complaint. Accordingly, the Court denies the motion at this stage in the action, without prejudice to renewal if the case proceeds on a properly served amended complaint.

It is therefore

¹ As Magistrate Judge Dancks notes, Senior District Judge Thomas J. McAvoy has previously instructed plaintiff that service on defendants by mail in care of the prison superintendent – the method of service used in the instant case – is ineffective because it does not comply with the Federal Rules of Civil Procedure. *See Fleming v. Kemp*, No. 9:09-CV-1185 (TJM/DRH), Dkt. No. 131, at 10 (N.D.N.Y. July 28, 2011).

ORDERED that the Report and Recommendation (Dkt. No. 45) is accepted; and it is further

ORDERED that defendants' motion (Dkt. No. 36) is granted to the extent that the action will be dismissed with prejudice for failure to state a claim unless plaintiff files an amended complaint within 30 days of the date of this Memorandum-Decision and Order; and it is further

ORDERED that **IF PLAINTIFF FAILS TO FILE AN AMENDED COMPLAINT WITHIN 30 DAYS OF THE DATE OF THIS MEMORANDUM-DECISION AND ORDER, THE ACTION WILL BE DISMISSED WITH PREJUDICE WITHOUT FURTHER NOTICE**; and it is further

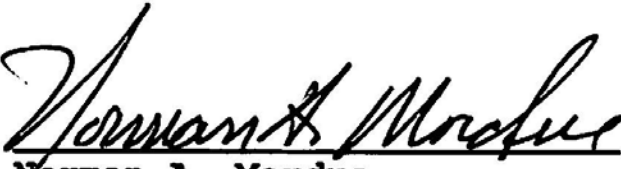
ORDERED that if plaintiff timely files an amended complaint, and if the amended complaint survives initial review, new summonses shall be issued for all defendants named in the amended complaint, to be served with the amended complaint in accordance with Rule 4; and it is further

ORDERED that plaintiff's motion (Dkt. No. 47) is denied; and it is further

ORDERED that the Clerk of the Court is directed to serve copies of this Memorandum-Decision and Order in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

Date: September 9, 2013
Syracuse, New York


Norman A. Mordue
Senior U.S. District Judge